STATE OF MICHIGAN

COURT OF APPEALS

CONSTANCE L. HENSLEY, Plaintiff-Appellant,	UNPUBLISHED January 23, 2014
v	No. 308621 Macomb Circuit Court
ROMEO COMMUNITY SCHOOLS, Defendant-Appellee.	LC No. 2010-005517-CZ

Before: METER, P.J., and JANSEN and WILDER, JJ.

PER CURIAM.

In this employment-discrimination action, plaintiff appeals by right the circuit court's opinion and order granting summary disposition in favor of defendant. We affirm.

I. BASIC FACTS

Plaintiff began working as the executive secretary in defendant's business office on November 15, 2000. Plaintiff's starting salary was $38,000 per year plus benefits. Plaintiff remained employed by defendant until January 22, 2010, at which time she claims she was constructively discharged because "the toxic environment was such that [she] . . .was . . . forced to retire."

Between 2000 and 2009, plaintiff's supervisor was Cynthia Schwark, defendant's director of business affairs. Plaintiff alleges that, during that time, Schwark "mocked" her and made unspecified inappropriate and derogatory comments toward her. Plaintiff also alleges that, as a result of Schwark's animosity toward her, Schwark routinely transferred her job responsibilities to a younger coworker, business office supervisor Heather Urbanek.[1] Plaintiff contends that, between 2002 and 2008, she was "denied job training, access to computer software applications, and job assignments[,] and treated differently than her coworkers by Ms. Schwark . . . ."

[1] We note that plaintiff has failed to identify any specific job responsibilities that were ever transferred to Urbanek.

Defendant was faced with significant budgetary shortfalls and was forced to decrease its expenditures nearly every year. In mid-2008, plaintiff discovered that defendant's board of education would be considering the possibility of eliminating certain positions, including hers, as part of a proposal to cut an additional $1.3 million from the district's budget. On May 24, 2008, plaintiff wrote a letter urging the board of education to eliminate Urbanek's position instead of her own. Plaintiff's letter to the board of education asserted that Urbanek was not capable of handling her work assignments or meeting deadlines, and suggested that plaintiff was a better employee than Urbanek. The board ultimately voted to cut only $900,000 from the district's budget; both plaintiff and Urbanek kept their positions.

Plaintiff alleges that, after the board's vote in late May 2008, Urbanek confronted her at work and argued with her about the letter that she had sent to the board of education. According to plaintiff, there is no way that Urbanek should have discovered the existence or content of the letter because it was a private letter written directly to the board. Plaintiff suggests that members of defendant's board of education or administration must have improperly shared the contents of the letter with Urbanek, providing evidence of their animosity toward her.

Four months later, plaintiff filed a complaint with Superintendent Joe Beck alleging that she was being harassed by Schwark and Urbanek. Beck interviewed employees of the business office and ultimately concluded that no harassment had taken place. Nevertheless, defendant hired a mediator to provide sensitivity training for the business office employees. Plaintiff suggests that Schwark once again transferred certain of her job responsibilities, including her "executive secretarial work," to Urbanek as retaliation. Plaintiff claims that "Schwark began to intensify her campaign against plaintiff" and that "[a]t Ms. Schwark's instigation, plaintiff's coworkers started to slander and harass her at work." Plaintiff also claims that "Urbanek slandered and harassed [her] in front of her coworkers," who "then began to shun her."

In January 2009, defendant's board of education was again faced with the necessity of significant budget cuts. The board ultimately approved more than $2 million in budget cuts, eliminating 16 teachers and support staff and closing one school building. Again, however, plaintiff's position was preserved and plaintiff kept her job, salary, and benefits.

Plaintiff claims that she suffered from significant stress related to defendant's budget cuts and the repeated possibility that her position would be eliminated. According to plaintiff, the stress from the budget cuts was too great to bear and she was eventually forced to take a leave of absence for medical reasons. Plaintiff remained on medical leave from January 2009, until early December 2009. Val Marriott was hired on an interim basis to fill in as the business office executive secretary during plaintiff's leave of absence.

Shortly after plaintiff's leave of absence began, on January 29, 2009, plaintiff filed a claim for workers' compensation benefits. Then, on February 5, 2009, plaintiff filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging that defendant had repeatedly attempted to eliminate her position because of her age.

Both Schwark and Beck retired while plaintiff was on leave. Mike Dixon was hired as the new interim director of business affairs. Dr. Nancy Campbell was hired as the new superintendent. Dixon gave Marriott certain additional accounting and computer-related

responsibilities. For example, Dixon required Marriott to assist with cash deposits, the collection of monies from various departments, and the preparation of Microsoft Excel spreadsheets. Plaintiff had never been required to perform any of these functions under Schwark's supervision.

When plaintiff returned to work on December 7, 2009, she learned that Dixon, her new supervisor, had implemented the aforementioned additional job responsibilities for the executive secretary position. Plaintiff claims that "[w]ithin two hours of returning to work" she was notified of additional, proposed budget cuts and that she would be required to perform the new accounting and computer-related tasks. Plaintiff also claims that she was immediately "subjected to harassment and bullying by her coworkers and new supervisors (Mr. Dixon and Superintendent Campbell)." It is undisputed that defendant thereafter paid to send plaintiff to Microsoft Excel training classes in an attempt to assist her with her computer skills.

Only days after returning to work, plaintiff took a vacation. Dixon testified at his deposition that plaintiff never received preapproval from her supervisors before taking this vacation. Plaintiff returned from her vacation on December 19, 2009.

On January 11, 2010, plaintiff filed a complaint with Superintendent Campbell alleging that she was being harassed by Dixon and that the new accounting and computer-related job responsibilities had been assigned to her as retaliation for her unsuccessful EEOC and workers' compensation claims. Plaintiff also requested a second leave of absence due to "severe anxiety" and "emotional distress."

Defendant offered to place plaintiff on long-term disability. This option would have allowed plaintiff to remain employed and continue receiving compensation, but to avoid the perceived stressors of the workplace. However, plaintiff refused the offer. Plaintiff interestingly testified at her deposition that, although she was suffering from severe anxiety and therefore unable to work, it would have been dishonest to go on long-term disability because she was "not disabled."

Upon receiving plaintiff's complaint, Campbell immediately consulted with the district's attorneys and called Dixon into her office for a meeting. Dixon denied plaintiff's allegations of harassment during his interview with Campbell. Campbell testified that she planned to meet with plaintiff as well, but plaintiff never returned to work after January 11, 2010. Plaintiff confirmed that she did not return to work, testifying that her physician "wanted me removed from [the] hostile workplace environment." Plaintiff submitted her letter of retirement on January 22, 2010, stating that she had been "forced to retire" and that her last day of work would be January 31, 2010.

On January 25, 2010, plaintiff filed a second EEOC charge, alleging discrimination and retaliation. On September 2, 2010, plaintiff filed a third EEOC charge, alleging discrimination and violations of the Americans with Disabilities Act, 42 USC 12101 *et seq*.

Plaintiff filed a claim for unemployment benefits, asserting that she had been terminated by defendant as of January 31, 2010. On October 12, 2010, the hearing referee issued a decision and order concluding that plaintiff was disqualified from receiving unemployment benefits under Michigan law because she had left work voluntarily within the meaning of MCL 421.29(1)(a).

The hearing referee noted that plaintiff had raised substantially similar allegations of harassment and retaliation against entirely different sets of supervisors, that plaintiff had failed to connect any of defendant's alleged actions to her own subjective decision to quit work, and that plaintiff had provided no evidence to establish that the alleged harassment and retaliation had even taken place.[2]

II. PROCEDURAL HISTORY

On December 22, 2010, plaintiff filed the instant action in the Macomb Circuit Court, setting forth claims of (1) disability discrimination in violation of Michigan's Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*., (2) retaliation in violation of the PWDCRA, (3) age discrimination in violation of Michigan's Civil Rights Act (CRA), MCL 37.2101 *et seq*., and (4) retaliation for filing a workers' compensation claim in violation of MCL 418.301(13). In an amended complaint, plaintiff set forth an additional claim of retaliation in violation of the CRA. Among other things, plaintiff claimed that her supervisors had (1) made unspecified "inappropriate and defamatory comments," (2) "slander[ed] and harass[ed]" her in front of her coworkers, (3) falsely accused her of dishonesty, (4) reassigned certain of her job responsibilities to Urbanek, a younger coworker, (5) repeatedly recommended that her position be eliminated, and (6) retaliated against her for writing a letter to the board of education, filing EEOC charges, and seeking workers' compensation benefits. Plaintiff alleged that she was suffering from severe anxiety, chronic stress, insomnia, high blood pressure, acid-reflux disease, arthritis, joint damage, immune disease, chest pains, weight gain, depression, and possible post-traumatic stress disorder "due to the hostile work environment." Plaintiff maintained that she was subjected to numerous, unspecified "disciplinary actions" and ultimately "terminat[ed] by [d]efendant" in violation of Michigan law.

After substantial discovery and several motions to compel, defendant moved for summary disposition on November 28, 2011. Among other things, defendant argued that it was beyond factual dispute that plaintiff was not subjected to an adverse employment action, terminated, or constructively discharged. Defendant also argued that, even if plaintiff subjectively felt she had been harassed or exposed to intolerable working conditions, there was simply no evidence that this had occurred, that it was done in retaliation, or that it was related to her age or alleged disabilities. Defendant pointed out that the repeated proposals to do away with plaintiff's position all stemmed from across-the-board budget cuts, and plaintiff's position had never been eliminated despite these proposals. Defendant presented spreadsheets, financial data, reports, and other documentary evidence showing that it had been required to make millions of dollars in budget cuts and eliminate numerous employee positions during the period that plaintiff was employed. Defendant noted that while plaintiff had kept her position, salary, and benefits throughout this period, other positions—including other secretarial positions—*had* been eliminated.

[2] On May 16, 2011, the Michigan Employment Security Board of Review affirmed the hearing referee's decision.

On December 12, 2011, plaintiff responded to defendant's motion for summary disposition, again arguing that she had been forced to retire as a result of intolerable working conditions. Plaintiff asserted that defendant had "spent years trying to remove [her] from the school district through a ruse disguised as budget cuts."

On February 2, 2012, the circuit court issued a detailed opinion and order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). The circuit court concluded that it was beyond genuine factual dispute that defendant had not been terminated by defendant. The circuit court also concluded that although plaintiff might have subjectively felt harassed or criticized, there was no evidence to suggest that any of defendant's complained-of actions were sufficiently intolerable to constitute adverse employment actions or to demonstrate a constructive discharge.

III. STANDARD OF REVIEW

We review de novo the circuit court's grant of summary disposition pursuant to MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "The pleadings, affidavits, depositions, admissions, and other admissible documentary evidence submitted by the parties must be considered in the light most favorable to the nonmoving party." *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007). "The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence *actually proffered* in opposition to the motion." *Maiden*, 461 Mich at 121 (emphasis added). "Summary disposition is proper under MCR 2.116(C)(10) if the affidavits and other documentary evidence show that there is no genuine issue concerning any material fact and that the moving party is entitled to judgment as a matter of law." *Kennedy*, 274 Mich App at 712.

IV. MISCONSTRUING FACTS AND MISCHARACTERIZING EVIDENCE

Plaintiff argues on appeal that the circuit court improperly construed facts in favor of defendant and mischaracterized certain pieces of evidence when deciding defendant's motion for summary disposition. We disagree.

We fully acknowledge that, when deciding a motion for summary disposition under MCR 2.116(C)(10), the circuit court must construe all well-pleaded facts in favor of the nonmoving party. *Maiden*, 461 Mich at 119. The court must not make findings of fact or credibility determinations when deciding a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

Plaintiff first contends that the circuit court improperly construed facts in favor of defendant when it concluded that her claims of harassment relating to the threatened elimination of her position were belied by the fact that her position was never actually eliminated. Plaintiff contends that, even though her position was not eliminated, "[i]t is not impossible for [her] claims to be supported at trial." As a preliminary matter, plaintiff relies on the incorrect standard of evidentiary production. "A litigant's mere pledge to establish an issue of fact at trial cannot

survive summary disposition under MCR 2.116(C)(10)." *Maiden*, 461 Mich at 121. It is irrelevant that a claim *might* be supported by evidence produced at trial because "[a] mere promise is insufficient under our court rules." *Id*. Instead, the nonmoving party must come forward with admissible evidence tending to establish the existence of a genuine issue of fact at the time of the motion for summary disposition. MCR 2.116(G)(4).

Moreover, plaintiff misrepresents the circuit court's actual ruling. Contrary to plaintiff's contention, the court did not rule that because plaintiff's position was never eliminated, she necessarily suffered no harassment. Instead, the court ruled that there was an insufficient evidentiary nexus between plaintiff's subjective complaints of harassment and defendant's proposals to eliminate the secretarial position as a result of necessary budget cuts. We perceive no error in the circuit court's ruling on this issue.

Plaintiff next contends that the circuit court improperly construed facts in favor of defendant when it concluded that Urbanek's anger toward plaintiff might have stemmed from the presentation of plaintiff's letter to the board of education. Again, we perceive no error. Contrary to plaintiff's argument in her brief on appeal, the circuit court was not "adopt[ing] the point of view of a harasser" when it reached this conclusion. Nor was the circuit court making an improper factual finding in this regard. The court was merely attempting to provide background for its decision to grant summary disposition by reciting the undisputed facts of the case.

Plaintiff also contends that the circuit court improperly attributed good-faith motives to defendant when it noted that defendant had hired a mediator to provide sensitivity training to business office employees. Again, however, we conclude that the circuit court was merely reciting the undisputed facts of the case.

Plaintiff next contends that the circuit court improperly construed facts in favor of defendant when it stated that the additional job responsibilities given to plaintiff in December 2009 were the same new responsibilities that Dixon had assigned to Marriott months earlier during plaintiff's leave of absence. She also contends that the circuit court improperly pointed out that she never returned to work after January 11, 2010. Again, we find no error. Both of these facts were amply established by the admissible documentary evidence presented below, and plaintiff made no attempt to rebut them with evidence of her own. Indeed, plaintiff admitted at her own deposition that she never returned to work after January 11, 2010, because her physician "wanted me removed from [the] hostile workplace environment."

Lastly, plaintiff contends that the circuit court mischaracterized the evidence and made improper findings of fact when it concluded that her allegations of harassment and mistreatment did not demonstrate an adverse employment action or constructive discharge. She also contends that the circuit court failed to consider each instance of alleged harassment in the context of the "prolonged period that led to her suffering severe mental and physical health issues." We do not agree. Contrary to plaintiff's claims, the circuit court did not weigh the competing evidence or assess the witnesses' credibility in any respect. Instead, it properly reviewed the admissible documentary evidence and concluded as a matter of law that plaintiff's subjective complaints of harassment and mistreatment were insufficient to support a jury-submissible claim of workplace discrimination. Indeed, it likely *would have* constituted improper fact-finding for the circuit court to consider each instance of alleged discrimination in the greater context that plaintiff now

proposes. In short, to withstand defendant's motion for summary disposition, it was incumbent on plaintiff to present admissible documentary evidence of her own establishing the existence of a genuine issue of material fact on each of her claims. MCR 2.116(G)(4). This she did not do. The circuit court did not improperly construe facts in favor of defendant, misconstrue the evidence, or make impermissible factual findings.

V. CONSTRUCTIVE DISCHARGE

Plaintiff argues that the circuit court erred by granting summary disposition in favor of defendant because there remained a genuine issue of material fact concerning whether she was constructively discharged. Again, we disagree.

"[C]onstructive discharge is not in itself a cause of action." *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 487; 516 NW2d 102 (1994). "Rather, constructive discharge is a defense against the argument that no suit should lie in a specific case because the plaintiff left the job voluntarily." *Id*. "Thus, an underlying cause of action is needed where it is asserted that a plaintiff did not voluntarily resign but was instead constructively discharged." *Id*. In the present case, plaintiff's underlying causes of action were age discrimination, disability discrimination, and retaliation.

Plaintiff points out in her brief on appeal that she "stated in her resignation letter that she was forced to retire" and "she indeed felt compelled to resign." However, in general, such subjective complaints are legally insufficient to demonstrate a constructive discharge. "A constructive discharge is established where 'an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation or, stated differently, when working conditions become so difficult or unpleasant that a reasonable person in the employee's shoes would feel compelled to resign.'" *Id*. at 487-488, quoting *Mourad v Auto Club Ins Ass'n*, 186 Mich App 715, 721; 465 NW2d 395 (1991). When reasonable persons could not disagree, the question whether a plaintiff was constructively discharged is an issue of law for the court. See *Vagts*, 204 Mich App at 488.

Like other panels of this Court, we find persuasive the reasoning of *LaPointe v United Autoworkers Local 600*, 103 F3d 485, 489 (CA 6, 1996), wherein the United States Court of Appeals for the Sixth Circuit held that "an employee who leaves his employment when he has been presented with legitimate options for continued employment with that employer . . . is precluded from claiming constructive discharge." In the case at bar, plaintiff admits that she had the option of remaining employed by defendant and going on long-term disability, but chose to retire instead. Although plaintiff characterizes this as a "forced retirement," she nonetheless admits that she could have remained employed by defendant.

Even in the absence of *LaPointe*, we would still conclude that plaintiff failed to demonstrate a genuine issue of material fact concerning constructive discharge. The instances of harassment and mistreatment cited by plaintiff are largely subjective and insignificant, and there is little or no documentary evidence to prove that they even occurred. Indeed, the undisputed record evidence suggests that defendant went to great effort to preserve plaintiff's job while other positions around the district were being eliminated due to substantial budget cuts. We do recognize that plaintiff might have been stressed and concerned for her job in light of the

repeated budget cuts that defendant was forced to make. But it is preposterous to suggest that defendant intentionally carried out these budget cuts for the secret purpose of harassing plaintiff and forcing her to resign. No rational jury could conclude that defendant made plaintiff's working conditions so intolerable that she was forced into involuntary resignation; nor could any rational jury conclude that plaintiff's working conditions became so difficult and unpleasant that a reasonable person in her position would have felt compelled to resign. See *Vagts*, 204 Mich App at 487. There is no evidence that a constructive discharge occurred in this case.[3]

VI. AGE AND DISABILITY DISCRIMINATION CLAIMS

Plaintiff next argues that the circuit court erred by dismissing her claims of age and disability discrimination. She contends that because she stated a prima facie case of age and disability discrimination under the CRA and PWDCRA, summary disposition was improper. We disagree.

Plaintiff's claims of error in this regard have not been properly presented for appellate review because they were not set forth in her statement of the questions presented. MCR 7.212(C)(5); *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 543; 730 NW2d 481 (2007). Accordingly, these claims are abandoned. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008).

At any rate, we note that in order to state a prima facie case of age discrimination under the CRA, a plaintiff must prove by a preponderance of the evidence that she has suffered an adverse employment action. *DeBrow v Century, 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538 n 8; 620 NW2d 836 (2001); *Lytle v Malady (On Rehearing)*, 458 Mich 153, 177; 579 NW2d 906 (1998) (opinion by WEAVER, J.). As the nonmoving party, plaintiff was required to come forward with admissible documentary evidence establishing the existence of a genuine issue of material fact with regard to this element of her claim. MCR 2.116(G)(4). But plaintiff merely rested on her allegations and subjective beliefs instead of coming forward with admissible evidence of an adverse employment action. Similarly, the circuit court properly dismissed plaintiff's claim of disability discrimination under the PWDCRA. The record contains no evidence to establish that plaintiff is disabled as defined by the PWDCRA or perceived as disabled within the meaning of the PWDCRA. See MCL 37.1103(d); *Peden v Detroit*, 470 Mich 195, 204; 680 NW2d 857 (2004); see also *Chiles v Machine Shop, Inc*, 238 Mich App 462, 475; 606 NW2d 398 (1999). We conclude that there was no genuine issue of material fact and that defendant was entitled to judgment as a matter of law on these claims.

VII. RETALIATION CLAIMS

Plaintiff also asserts that the circuit court improperly dismissed her claims of workers' compensation retaliation, retaliation under the CRA, and retaliation under the PWDCRA. We disagree.

[3] In light of this conclusion, we need not consider whether defendant proffered a legitimate, nondiscriminatory reason for plaintiff's alleged discharge.

Plaintiff's assignment of error relating to her retaliation claims has not been properly presented for appellate review. MCR 7.212(C)(5); *Ypsilanti Fire Marshal*, 273 Mich App at 543. In any event, plaintiff has failed to establish that defendant unlawfully retaliated against her. To establish a prima facie case of workers' compensation retaliation under MCL 418.301(13), a plaintiff who has suffered a work-related injury must prove, among other things, "that the employer took an employment action adverse to the employee" and "that the adverse employment action and the employee's assertion or exercise of a right afforded under [the Workers' Disability Compensation Act] were causally connected." *Cuddington v United Health Services, Inc*, 298 Mich App 264, 275; 826 NW2d 519 (2012). Similarly, to establish a prima facie case of retaliation under the CRA or PWDCRA, a plaintiff must show that "the defendant took an employment action adverse to the plaintiff" and that "there was a causal connection between the protected activity and the adverse employment action." *Aho v Dep't of Corrections*, 263 Mich App 281, 288-289; 688 NW2d 104 (2004); *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997). As explained previously, plaintiff failed to present any admissible evidence of an adverse employment action in this case. Plaintiff's retaliation claims were properly dismissed.

VIII. CONCLUSION

We cannot omit mention that plaintiff's appeal borders on frivolous and is largely devoid of legal merit. Moreover, plaintiff's brief does not conform to the court rules. In particular, we note that a litigant's statement of facts must not be argumentative, and must fairly present the facts of the case, both favorable and unfavorable. MCR 7.212(C)(6). In the exercise of our discretion, we decline to sanction plaintiff or dismiss her appeal. See MCR 7.216(A)(10); 7.216(C)(1)(a). However, we caution plaintiff that any future appeals must be well-grounded in fact and law and pursued in conformance with the rules.

Affirmed. As the prevailing party, defendant may tax costs pursuant to MCR 7.219.

/s/ Patrick M. Meter
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder